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In the
Supreme Court of the United States

October Term, 1982

Charles Tillman ..... *Petitioner*

V.

State of Arkansas ..... *Respondent*

WRIT FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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QUESTIONS PRESENTED FOR REVIEW

I.

THE DECISION BELOW ALLOWS A CLEAR VIOLATION OF FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND IS CONTRARY TO THIS COURT'S RULING IN *ROBBINS V. CALIFORNIA*, ___ U.S. ___, 101 S.Ct. 2841 (1981).

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WRIT FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

OPINIONS BELOW

The opinion of the Arkansas Supreme Court is reported at Ark. (Mar. 8, 1982) and is attached as Appendix "B". The denial of the Petition for Rehearing, issued April 12, 1982, is attached as Appendix "D".

JURISDICTION

The opinion of the Arkansas Supreme Court was filed on March 8, 1982. The Petition for Rehearing was denied by that Court on April 12, 1982. Jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Fourth Amendment:

(Unreasonable searches and seizures.)—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Ark. Stat. Ann. 43-429:

43-429: Stopping and detaining person reasonable suspected of committing or about to commit a felony—Time Limit.—(a) Law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person whom he reasonably suspects is committing, has committed, or is about to commit a felony, if such action is reasonably necessary to identify or determine the lawfulness of such person's conduct. An officer acting under this section may require that person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes, at the end of such period the person detained shall be released without further restraint, or arrested and charged with a crime.

(b) As promptly as is reasonable under the circumstances, a law enforcement officer who has detained a person under this section shall advise that person of his official identity and inform such person of the reason for the detention, (Acts 1969, No. 378, 1, p. 1086)

STATEMENT OF THE CASE

Deputy Alan Swint of the Lonoke County Sheriff's Department was in the England, Arkansas Police Department on February 4, 1980, at approximately 12:30 p.m. when an unknown person entered the police department and told him that he had been following a bronze Cadillac with three black males in the vehicle from North Little Rock to the vicinity of Scott, Arkansas. He told the Deputy that the car would slow down at certain houses and then continue on. On the basis of this information, Deputy Swint proceeded to the Scott area and upon reaching the intersection of Highway 130 and Walkers Corner Road, he observed the Cadillac automobile in the roadway facing south. The automobile proceeded to the stop sign at Highway 130 and turned toward North Little Rock. The Deputy followed the automobile into Pulaski County and almost into the North Litle Rock City limits. At that point he stopped the vehicle by use of the lights on his police unit and stopped a Pulaski County Sheriff's car at the same time. The Deputy then arrested and took into custody all three occupants of the vehicle. Petitioner being one, and placed in the police unit. After the three occupants were arrested Deputy Swint received a police communication that the George Brown home on Walker Corner Road had been burglarized. He then opened the trunk of the automobile and observed some folding clothing bags in the trunk of the vehicle. The prisoners and the automobile were then transported to the Lonoke County Sheriff's Department where the items were seized from the trunk of the vehicle and the Appellants were officially charged with burglary and theft. Petitioner moved to suppress the evidence seized and a hearing was conducted, by the Lonoke Circuit Court and the Motion was denied. On August 19, 1980, Petitioner was tried by a jury in Lonoke Circuit Court, found guilty and sentenced on both the burglary and the theft charges.

Following conviction of Petitioner, his case was appealed to the Arkansas Supreme Court and on March 8, 1982, an opinion was delivered affirming by four to three vote the rulings of the lower court. A Petition for Rehearing was filed on March 24, 1982 and on April 12, 1982, the Court denied the rehearing again by four to three vote.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW ALLOWS A CLEAR VIOLATION OF FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND IS CONTRARY TO THIS COURT'S RULING IN *ROBBINS V. CALIFORNIA*, ___ U.S. ___, 101 S.Ct. 2841 (1981).

It must be determined whether the detention of the three men constituted an arrest or merely an investigatory stop and the legality of either.

If the detention was an arrest then probable cause would be necessary in order for the arrest to be legal. Probable cause for an arrest means there must be a substantial probability that a crime has been committed and that the person to be arrested committed it. Petitioner contends the detention was an arrest and probable cause was not sufficient making the arrest an illegal one. The legal issue of probable cause necessary for arrest without a warrant must be resolved on a case-by-case basis from individual facts and circumstances. *Harris v. Stephens* 361 F.2d 888 (1966).

In *McDonald v. State*, 491 S.W.2d 253, Ark. 812 (1973) the Supreme Court of Arkansas stated, "Counsel is mistaken in arguing that there was no arrest simply because the officers did not use the word "arrest" before making the search. It is the actual restraint, or consent to restraint, that constitutes an "arrest"! In this particular case, the three men were being restrained and they felt compelled to move in accordance with the arrestor's instructions. In other words they felt their freedom of movement had been taken away. Also, in the arresting officer's testimony he concedes that the men were arrested. (See dissenting opinion, page 2).

Since this appears to be an arrest, according to the law and of the officer's testimony, Appellant contends probable cause was not sufficient to make the arrest. At the time of the detention the arresting officer did not have any knowledge that a crime had been committed and at that time did not have probable cause to make the arrest.

The majority opinion denies that this was an arrest but maintains it was only an investigatory stop. Reasonable suspicion is required for an investigatory stop to be made. This is a slightly lesser standard than probable cause. However, this type of stop is limited and does have restrictions. The Supreme Court of the United States has recognized this type of stop in four situations. In *Terry v. Ohio*, 392 U.S. 1 (1968), and *Adams v. Williams*, 407 U.S. 143 (1972), the search was limited to the person's clothing and the area within their immediate control and this was only to protect the officer from any harm that might come to him if weapons were hidden. In *United States v. Brignon-Ponce*, 422 U.S. 873 (1975), special circumstances existed for border searches and stops.

Finally, in *United States v. Cortez*, 499 U.S. 411 (1981) the court said it was necessary for there to be an objective manifestation that the person is, or is about to be, engaged in criminal activity, the detention and investigation may not be based on a peace officer's unsupported intuition, subjective feelings or suspicion, mere hunch, or good faith but it must be based on the objective perception of events, without particularization as to a specific crime. "The analysis of that objective manifestation may include articulation of objective observations, information from police reports or consideration of modes or patterns of operation of criminals. (See dissention opinion – page 4). *United States v. Cortez. supra.*

In this particular case, the Deputy had information from an unknown and unidentifiable informant. In *Auguilar v. Texas*, 378 U.S. 108 (1964), underlying circumstances

necessary to judge the validity of an informant's conclusion were necessary and the informant must be shown to be credible and his information reliable. There is some question in this case whether either one of these requirements was satisfied regarding the informant. The Deputy had knowledge of prior burglaries, but no testimony was introduced to demonstrate the modes or patterns of those burglaries. The deputy did not know appellants or their backgrounds. "The specificity in the information is the touchstone on which a legitimate investigatory stop is made." *United States v. Cortez, supra*, in the instant case, it appears the officer did not articulate a reasonable suspicion for the stop and it was therefore unlawful.

Since, whether classified as an arrest or an investigatory stop, the detention was unlawful, the evidence seized as a result is tainted and should be excluded. *Wong Son v. United States*, 371 U.S. 471 (1963).

If the evidence cannot be suppressed for the preceding reason, then, if allowed it must fit into an exception to the general rule which says the seizure of evidence without a warrant is, per se, unreasonable. *Katz v. United States*, 389 U.S. 347 (1967).

In this case the seizure cannot be classified as one incident to an arrest because the deputy testified that the car was not searched until sometime later. "Once an accused is under arrest and in custody, then a search made at another place without a warrant is simply not incident to arrest" *Cambers v. Maroney*, 399 U.S. 42 (1970) quoted in *Jenkins v. State*, 253 Ark. 249, 485 S.W.2d 541 (1972).

This particular search and seizure cannot be classified as a protective search because it was not a frisk for the officer's protection. The search cannot be classified as a "plain view" exception because the inside of the trunk would not be considered in plain view.

New York v. Belton, ___ U.S. ___ 101 S.Ct. 2860 (1981) allows for a search of the passenger compartment of a vehicle when a lawful custodial arrest has been made. This case is not applicable however, because it does not address any area other than the passenger compartment and no mention of the trunk is made. However, in *Robbins v. California*, ___ U.S. ___, S.Ct., 2841 (1981), officers uncovered a recessed luggage compartment in a station wagon and found two plastic garbage bags containing 30 pounds of marijuana. The Supreme Court of the United States *rejected* the contention that the "automobile exception" to the Fourth Amendment warrant requirement justified the warrantless search of closed containers found inside the automobile and held the contents of a closed container is such that its contents are in plain view.

In this particular case, there is some question about whether the contents were in plain view. The deputy testified he saw the silver but the photograph does not show any of the contents of the luggage. The case does involve closed containers found in a recessed compartment (trunk) and thus, if *Robbins* is followed, would be protected by the Fourth amendment warrant requirement and the evidence should be excluded because a warrant was not obtained. The majority opinion argues the 1925 "Automobile exception" case of *Carroll v. United States*, 267 U.S. 132 (1925). That case allows a warrantless search where the vehicle can be quickly moved out of the locality, but in this case the car was in custody and could not be moved.

Arkansas cases which are directly in point hold that a warrantless search of a vehicle is invalid unless there is *both* a probable cause and exitent circumstances. The United States Supreme Court has allowed warrantless searches on probable cause alone and the majority opinion argues that when the officer learned of the burglary he then had probable cause to believe the vehicle contained evidence of the crime and the search was legal. However, if you follow Arkansas case law, exigent circumstances must

also exist for a search without a warrant. *Jenkins v. State, supra; Stell v. State*, 248 Ark. 159, 450 S.W.2d 545 (1970). Arkansas cases directly in point should govern even if the standard is more stringent. *Meadows v. State*, 269 Ark. 380, 602 S.W.2d 636 (1980). In this case, no exigent circumstances existed because the three men were in custody and the car was impounded. There was no immediate danger to the officers and no possibility of any evidence being destroyed. The officers had time to get a warrant after transporting the car to the Sheriff's compound and should have done so. Because the search did not fit into any of the exceptions to the general rule, the evidence should have been suppressed because a warrant was not obtained.

CONCLUSION

For the above-stated reasons, the Petitioner respectfully submits that the Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

SUPREME COURT OF ARKANSAS

No. CR 81-47

Charles Tillman and Charles Huggins,	Appellants	
V.		Appeal from Lonoke Circuit Court
State of Arkansas,	Appellee	Cecil Tedder, Judge
and		
Leandrew Byrd, Jr.,	Appellant	
V.		
State of Arkansas,	Appellee	Dissenting Opinion

(Consolidated on Appeal)

ROBERT H. DUDLEY, Associate Justice

The plurality opinion affirms two seizures, one, a seizure of the defendants and two, a seizure of the evidence. Both violate the Fourth Amendment.

I
Seizure of the Defendants

Stopping an automobile and detaining its occupants constitute a seizure within the meaning of the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648 (1979). A stop and arrest without a warrant is valid only when the arresting officer has reasonable grounds to believe that the arrested person has committed a crime. Ark. Stat. Ann. §43-403 (Repl. 1977); *Johnson v. State*, 249 Ark. 208, 458 S.W.2d 409 (1970). Reasonable grounds under the Arkansas statute equate with the federal standard of probable cause for arrest. *Tweedy v. United States*, 435 F.2d 702 (8th Cir. 1970). The majority opinion impliedly admits that at the time Deputy Swint stopped the appellants he did not know a

crime had been committed and, at that moment, did not have probable cause for arrest. Yet, that is exactly what occurred as the Appellants were arrested without probable cause. The testimony of Deputy Swint is clear:

Q. Where were you located when you stopped the defendants?
A. Just south of Superwood on Highway 130.
Q. Did you turn on your lights?
A. Yes, sir.
Q. And did they promptly stop, or did you have to give chase?
A. No, sir, they promptly stopped.

. . .

Q. When you stopped the vehicle, what did you do?
A. *Came out with my shotgun, advised the subjects to step out of the car, placed them on the trunk of the vehicle, patted them down, handcuffed them, and one at a time, placed them in my vehicle. I advised them they were being held on suspicion of burglary.*

. . .

Q. *So upon taking them out, you advised them they were under arrest for suspicion of burglary?*
A. *Right.*
Q. *And you restrained them, placed them physically under arrest in your vehicle in Pulaski County?*
A. *Yes, sir.*

. . .

Q. And what did you do with the three defendants and with the car at that time?
A. At that time, about that time, Officer Todd had arrived. I told him about everything and I think an England officer, England police officer had also arrived, and he advised to go ahead and take them

to the Lonoke Sheriff's office and we would get the England officer to stand by the vehicle until the wrecker gets there. I did so.

Q. Did you then transport the three defendants to the jail?

A. Yes, sir.

To constitute an arrest, as opposed to an investigatory stop, there must be three simultaneous occurrences. One, there must be a seizure. Two, the seizure must be performed with the intent to make an arrest, rather than make a temporary investigation, and three, the prisoner must understand he is being arrested rather than merely being stopped for investigation. These three events occurred. The appellants were arrested without probable cause and as a result, the evidence seized should have been suppressed. Nothing more need be said on this point.

The plurality of my brothers on this bench deny that there was an arrest, but insist there was only an investigative stop, that relatively new dimension by which seizures based on less than probable cause can be made and still comply with the reasonableness standard of the Fourth Amendment. Rules 2 and 3 of the Rules of Criminal Procedure, Ark. Stat. Ann. Vol. 4A (Repl. 1977), labeled "Pre-Arrest Contacts" and "Detention Without Arrest," deal with investigatory stops.

Rule 3.1 provides that a law enforcement officer may detain, for up to fifteen minutes, any person who he reasonably suspects is committing, has committed, or is about to commit a felony. Reasonable suspicion is required for an investigatory stop as distinguished from the probable cause required for an arrest. This lesser standard is defined in Rule 2.1 as:

> "Reasonable suspicion" means a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a

> lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion.

The Supreme Court of the United States has now recognized four situations where seizures based on less than probable cause, or reasonable suspicion, have complied with the reasonableness standard. See Erickson, *Pronouncements of the United States Supreme Court Relating to the Criminal Law Field 1980-81*, The National Journal of Criminal Defense, Vol. VII (1981).

First, in *Terry v. Ohio*, 392 U.S. 1 (1968) a limited stop and frisk was approved. Second, in *Adams v. Williams*, 407 U.S. 143 (1972) a stop was approved to investigate an informant's tip that the person stopped was armed and carrying narcotics. Third, in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the Court held that border patrol officers may make investigatory stops of vehicles near the country's borders if there are articulable facts that reasonably warrant a suspicion that the vehicle contains illegal aliens. Fourth, in *United States v. Cortez*, 449 U.S. 411 (1981), a case involving an investigatory stop similar to the one before us, the Court held that objective facts and circumstantial evidence suggesting that a particular vehicle may be involved in criminal activity may provide a sufficient basis to justify an investigatory stop of that vehicle. Recognizing that investigatory stops are subject to restraints against unreasonable seizures imposed by the Fourth Amendment, the Court defined the factors that create an objective manifestation that the person is, or is about to be, engaged in criminal activity. The analysis of that objective manifestation may include articulation of objective observations, information from police reports, or consideration of modes or patterns of operation of criminals. It is from these data that a trained officer draws inferences and makes deductions that might elude an untrained person. *United States v. Cortez*, supra.

Our rule and the comparative statute authorize an investigatory stop, *Hill v. State*, 274 Ark. ____, ____ S.W.2d ____ (Feb. 8, 1982); *Holmes v. State*, 262 Ark. 683, 561 S.W.2d 56 (1978), and the Supreme Court of the United States has held that investigatory stops can be valid. *United States v. Cortez*, supra. The Fourth Amendment does not require probable cause or reasonable grounds for this type of stop. The required standard for an investigatory stop is a reasonable suspicion as shown by an objective manifestation that the suspect is, has been, or is about to be, engaged in criminal activity.

In the case at bar the arresting officer had a report that three men were reconnoitering residences. He knew there had been previous burglaries in the area. However, he did not know that a crime had been committed and he did not know one was about to be committed. He arguably did not think he had cause to stop the appellants when he first saw them because he did not stop them. He had no additional articulable facts when he finally stopped appellants' car.

At the suppression hearing the deputy admitted that he only had the information from an unknown and unidentifiable informant, the knowledge there had been prior burglaries in the area and appellants' car was near Brown's home. His testimony is clear.

Q. So at the time you stopped them some distance down the road, you were, at that time, not aware of any crime that they had committed?
A. I believed they had committed one.
Q. I understand you believed that, even though you had no knowledge of that.
A. No proof at that time, no, sir.
Q. You did not even know whether a crime had been committed, is that correct?
A. For sure, no, sir.
Q. So you made a stop in Pulaski County out of your jurisdiction?
A. Along with a Pulaski County Deputy.

Q. They were not trying to evade you, no hot pursuit?
A. No, sir.
Q. And the only thing that you were basing that arrest on was the discussion that you had had with an unknown male?
A. Yes, sir.
Q. You had no knowledge of whether what he was telling you was truthful or untruthful, reliable or unreliable?
A. At the time he was telling me, no, sir.
Q. So you made the arrest, you had them in custody, placed them in your vehicle before you learned of any violation, if any, that they had committed?
A. I had them in my vehicle before I was certain whether or not the residence had been burglarized.
Q. Did they ever call on the radio and tell you these men had burglarized the place?
A. No, sir.
Q. Or did they give you any information concerning them burglarizing the home?
A. No, sir, he advised me the residence had been burglarized.
Q. So the only thing you knew at that time was you observed this vehicle on the road in front of or near this home, and had followed it?
A. Yes, sir.
Q. That's the only thing you had to connect them with any crime in this area?
A. Yes, sir.

There was no testimony introduced to demonstrate the modes or patterns of the earlier burglaries. There was no testimony to show if the earlier burglaries had taken place in the daytime or at night; no testimony to demonstrate if the police suspected one or more burglars; no testimony about the method of transportation used; and no testimony about footprints or fingerprints from the earlier burglaries. Deputy Swint admitted he did not know appellants and he knew nothing of their backgrounds. The appellants' manner

of dress was not unusual and there was nothing suspicious about their appearance. He quite simply did not articulate a reasonable suspicion.

Articulated objective facts or articulated circumstantial evidence suggesting that a particular vehicle may be involved in criminal activity can provide a sufficient basis to justify an investigative stop of a vehicle. The test is whether under the totality of the circumstances—the whole picture—the officers are able to articulate a particularized and objective basis for suspecting the particular person stopped of criminal activity. *The specificity in the information is the touchstone on which a legitimate investigative stop is made. United States v. Cortez*, supra. In the case before us the officer did not articulate specific facts to reasonably suspect appellants had committed a crime. An inarticulable hunch is not sufficient to justify an investigatory stop. The articulation of facts or data is the only testimony from which the trial court can determine whether a trained police officer has drawn inferences and made valid decisions or whether an officer just played a hunch with no real grounds. When an officer does not articulate a reasonable suspicion for the investigatory stop it should be declared unlawful.

A hypothetical example, using facts comparable to the case at bar, will demonstrate the reason. Suppose you, the reader of this opinion, own a puppy and it strays away from your home. You get in your car and drive a few blocks, across a county line, and begin carefully looking for your pup. Some unknown and unidentifiable person sees you "casing" the neighborhood and calls the police. A policeman knows that there have been burglaries in the area and he sees your car in front of a house which had been burglarized some months ago. According to the plurality opinion those facts are sufficient for the officer to follow you back into your original county (under a doctrine, not discussed by the plurality of "hot pursuit to investigate") and stop you

pursuant to Rule 3.1. There were no stronger facts articulated in the principal case. Just as you would have been stopped on an unarticulable hunch in the hypothetical case, these appellants were stopped. The reason for requiring the articulation of a reasonable suspicion is obvious.

Since the stop was not shown to be lawful the evidence should have been excluded. *Wong Son v. United States*, 371 U.S. 471 (1963).

II
Seizure of the Evidence

On the proof before the trial court the evidence should have been suppressed for a second reason. The general rule is that a seizure of evidence without a warrant is, per se, unreasonable. *Katz v. United State*[illegible]89 U.S. 347 (1967). Unless the warrantless seizure in this case fits into an exception the evidence seized must be suppressed. The facts determine whether this case fits into an exception.

After the appellants were handcuffed and in the patrol car Deputy Swint opened the trunk of their car which was parked on the highway. He saw two bags in the trunk, a flowered-type one on the bottom and a black one on top. The flowered-type bag was zipped shut but the black one was partially unzipped and the deputy saw some silver inside. He stated that he could not identify it as the silver belonging to the Browns and he admitted that for all he knew it could have belonged to appellants. He closed the trunk and called Fulmer's Wrecker Service to tow the car to some type of sheriff's compound at Lonoke. Miles and perhaps hours later, at some type of sheriff's compound, a warrantless search of the car was conducted. Deputy Swint's testimony is emphatic that the car was not searched on the highway:

Q. But your testimony is that you did not search the vehicle on the highway?
A. No, sir.
Q. Irrespective of how you wrote your report, Mr. Swint, did you search those suitcases on the highway?
A. No, sir.
Q. Were they searched at the Sheriff's office?
A. They were inventoried at the Sheriff's office, yes, sir.

MR. EDWARDS:
That's all.

THE COURT:
Was anything removed from the automobile before it was returned to the Sheriff's office?
A. Just the three people.

THE COURT:
Any property of any kind?
A. No, sir.

. . .

Q. You had the vehicle under control, is that correct? You had the three men out of it?
A. Yes, sir.
Q. You had the keys to it?
A. Yes, sir.
Q. You had officers there guarding it?
A. Yes, sir.
Q. And it was returned to the Sheriff's office?
A. Yes, sir.
Q. And I assume once it got there, or wherever the Sheriff's office is located, that you had it under guard, or whatever it took to make it secure?
A. Yes, sir.

Those facts do not allow this case to fit into an exception to the general rule. The Supreme Court of the United States has set forth only one narrowly drawn exception where a seizure of evidence can be based on less than probable cause. It is the protective search doctrine set out in *Terry v.*

Ohio, supra, and *Adams v. Williams*, supra. It authorizes a search of the clothing and that area which is immediately reachable by the arrested person. The basis of this exception is that the arresting officer has every right to assure himself that the person does not have within reach a weapon, although the weapon may be evidence. The rationale of this exception is applicable to an investigatory stop, an arrest, or any other seizure. This exception to the general rule against warrantless searches is not applicable because this was not a frisk for the officer's protection.

There is another exception that is not as severely limited as the first exception. It is based on probable cause and is the search incident to arrest doctrine, but it is not applicable. "Once an accused is under arrest and in custody, then a search made at another place without a warrant, is simply not incident to arrest." *Chambers v. Maroney*, 399 U.S. 42 (1970) quoted in *Jenkins v. State*, 253 Ark. 249, 485 S.W.2d 541 (1972).

The "plain view" exception, *Chimel v. California*, 395 U.S. 752 (1969), is not applicable as Deputy Swint did not have a plain view of the inside of the trunk of the car.

The plurality opinion concedes that the most recent "automobile exception" case, *New York v. Belton*, ____ U.S. ____, 101 S.Ct. 2860 (1981), is not applicable but argues that the 1925 "automobile exception" case of *Carroll v. United States*, 267 U.S. 132 (1925) is applicable. The 1925 case states that a warrantless search is valid "where it is not practical to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." In this case the car was in custody and could not be moved.

The plurality opinion states:

> What is claimed, correctly we think, is that when Officer Swint learned the Brown residence had been

> burglarized, at that point he had probable cause to believe the vehicle contained evidence of the crime and, hence, a search of the vehicle was proper.

The quoted statement is contrary to the law as announced by the Supreme Court of the United States and followed by the court in *Jenkins v. State*, supra at 252, where we stated:

> It is true that there is language in the *Chambers* case suggesting that probable cause alone is sufficient to sustain a warrantless search of an automobile, but that point of view seems to have been rejected in the later case of *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). There Justice Stewart speaking upon this point for a majority of the court, had this to say about a contrary position taken in Justice White's dissent in the *Coolidge* case: "If we were to agree with Mr. Justice White that the police may, whenever they have probable cause, make a warrantless entry for the purpose of making an arrest, and that seizures and searches of automobiles are likewise per se reasonable given probable cause, then by the same logic *any* search or seizure could be carried out without a warrant, and we would simply have read the Fourth Amendment out of the Constitution.

The plurality could validly contend that the case of *Colorado v. Bannister*, 449 U.S. 1 (per curiam 1980) stands for the proposition that when the police have probable cause to believe the vehicle contains evidence of a crime a warrantless search is permissible even when the car has been moved to the police station. Perhaps that leaves Arkansas with a higher standard than the United States for our cases, which are directly in point, hold that a warrantless search of a vehicle is invalid unless there is both probable cause and exigent circumstances. *Jenkins v. State*, supra; *Steel v. State*, 248 Ark. 159, 450 S.W.2d 545 (1970). Arkansas cases directly in point should govern even if the plurality believe that our standard is a more stringent standard than the minimum required by the Constitution of the United States.

> We need not determine whether the rule is more restrictive than the principles to be distilled from various Supreme Court decisions, for, of course there is no constitutional objection to a rule of law which provides more protection to individual liberty than the minimum required by the Constitution of the United States.

Meadows v. State, 269 Ark. 380, 602 S.W.2d 636 (1980).

However, even if one discards all that has been written to this point as peripheral to the search of appellants' bags, the search of the bags still must fail. Both bags were completely closed, with the black one being zipped together completely and the flowered one being partially zipped. In the recent case of *Robbins v. California*, ____ U.S. ____, 101 S.Ct. 2841 (1981), the California Highway Patrol officers stopped the petitioner's car because he was driving erratically. One of the officers asked petitioner for his license and registration, and when he opened the car door to get out the registration, the officers smelled marijuana smoke. One of the officers patted the petitioner down, and discovered a vial of liquid. The officers then searched the passenger compartment of the car and found marijuana as well as equipment for its use. After putting the petitioner in the patrol car the officers opened the tailgate of the station wagon, uncovered a recessed luggage compartment, and found two oblong packages wrapped and sealed in green opaque plastic garbage bags. The officers unwrapped the packages and found 30 pounds of marijuana.

Petitioner, who was charged with various drug offenses, filed a pretrial motion to suppress the marijuana found in the two packages. The motion was denied and petitioner was convicted. The California Court of Appeals affirmed the judgment. Certiorari was granted and the case was remanded for further consideration in light of *Arkansas v. Sanders*, 442 U.S. 753 (1979). On remand, the court of

appeals again found the warrantless opening of the packages constitutionally permissible, since the trial court reasonably could have concluded that the contents of the packages could have been inferred from their outward appearance. The Court again granted certiorari because of the continuing uncertainty as to whether closed containers found during lawful warrantless automobile searches may be searched without a warrant.

In a plurality decision written by Justice Stewart, the Court held that the contents of a closed container are fully protected by the Fourth Amendment's warrant requirement, unless the container is such that its contents are in plain view.

Relying on *United States v. Chadwick*, 433 U.S. 1 (1977) and *Arkansas v. Sanders*, supra, the Court rejected the contention that the "automobile exception" to the Fourth Amendment warrant requirement justifies the warrantless search of closed containers found inside the automobile. Justice Stewart stated that *Chadwick* and *Sanders* make it clear that a closed piece of luggage found in a lawful search of a car, is constitutionally protected to the same extent as closed pieces of luggage found anywhere else.

Respondent argued that the *nature* of the container may diminish the constitutional protection and that the Fourth Amendment protects only containers commonly used to transport personal effects. The Court rejected the argument for two reasons: (1) the Fourth Amendment protects people and their effects, whether the effects are personal or impersonal; and (2) it would be difficult if not impossible to perceive any objective criteria to determine what is commonly used to transport personal effects.

Justice Stewart stated that the wrapped marijuana did not fall under the exceptions announced in a footnote in *Arkansas v. Sanders*, supra. The footnote states that containers whose contents can be inferred from their

outward appearance, for example a kit of burglary tools or a gun case, and containers whose contents are open to plain view, do not require a search warrant under the Fourth Amendment. These exceptions refer to items in a container that is not closed, or to containers which so clearly announce their contents, whether by their distinctive configuartion, their transparency, or otherwise, that their contents are obvious to an observer. Justice Stewart concluded that the vague testimony of the police officer who said that he had heard that contraband was wrapped in a particular way did not establish that marijuana is ordinarily "packaged this way," and thus, did not cause the packages to fall within the exceptions announced in *Sanders*. In a footnote, the Court stated that the prosecution did not argue that the search of the packages was incident to a lawful custodial arrest or that the petitioner consented to the search of the packages. See *New York v. Belton*, supra.

Robbins, supra, should not be ignored.

A second ground given by the plurality opinion for validating the search is:

> . . . Rule 14.1 (a), A.R.Crim. P., gives an officer the right to make a warrantless search of a vehicle detained on a public way if he has reasonable cause to believe the vehicle contains evidence subject to seizure, and exigent circumstances require immediate action to prevent removal or destruction of such evidence.

Rule 14.1 (a) simply is not applicable. The vehicle was not "detained on a public way" when searched; rather it was locked in a sheriff's compound. There was no testimony of "evidence" subject to seizure. No witness testified that even one piece of the Browns' property was identifiable. There were no exigent circumstances as the car was locked up in a compound and the appellants were in jail.

Perhaps, in this case, we have forgotten the proper role of the appellate court. It is nothing more and nothing less than to review the trial below and determine whether the appellants received a fair trial, not a perfect trial, but a fair trial. Precedent of this court as well as that of the Supreme Court of the United States hold that the evidence should have been suppressed. The trial court did not so hold and, as a consequence, the appellants did not receive a fair trial. I would grant appellants a new and fair trial. I dissent.

I am authorized to state that Mr. Justice Holt and Mr. Justice Purtle join in this opinion.

APPENDIX "B"

SUPREME COURT OF ARKANSAS

No. CR 81-47
Opinion Delivered Mar. 8, 1982

Charles Tillman and Charles Huggins,	Appellants	
V.		
State of Arkansas,	Appellee	Appeal from Lonoke County Circuit Court
and		Hon. Cecil Tedder,
Leandrew Byrd, Jr.,	Appellant	Judge
V.		
State of Arkansas,	Appellee	Afffirmed.

STEELE HAYS, Associate Justice

Appellants were convicted of theft of property and burglary of a residence in Lonoke County, receiving concurrent ten year sentences on each charge. For reversal, they allege the trial court erred in not suppressing evidence seized without a warrant, in not permitting the introduction of statements elicited from them by the police, and in

permitting a police officer to give opinion testimony. We find no error.

The facts given us are that shortly after noon on February 4, 1980, a private citizen followed the three appellants from North Little Rock to near Scott, a distance of about 15 miles, and watched them slow down and scrutinize residences along the way. He formed the belief that they were "casing" the residences for burglary, particularly one at the intersection of Highway 130 and Walker's Corner Road. Leaving his own pursuits, he drove to the police station at England where he reported the information to Deputy Sheriff Alan Swint. Mr. Swint knew the location to be sparsely settled, to have been subjected to a rash of recent burglaries and knew the residence of George Brown to be at that point. Appellants' car, a bronze Cadillac, was unfamiliar to him. Swint went directly to the scene where he saw the Cadillac stopped, but positioned diagonally across the highway in such a manner as to suggest having just backed from the Brown driveway. Swint radioed another officer to investigate the residence as he followed the appellants. In North Little Rock he signalled another police vehicle to assist him and with that help he stopped the occupants and told them they were being held for suspicion of burglary. After handcuffing the appellants he received a radio report that the Brown residence had, in fact, been burglarized. With that information, he opened the trunk and observed two garment bags. One, he maintains, was partially opened, enabling him to see articles of silver service. On whose facts appellants' motion to suppress was denied.

I.

Appellants maintain the initial stop and detention was an unlawful arrest and seizure and there was no probable cause for the search. We disagree.

Our Rule of Criminal Procedure 3.1 gives a police officer the right to stop and detain for up to 15 minutes [1] any person he reasonably suspects has committed a felony. Rule 2.1 defines the test as more than an imaginery or purely conjectural suspicion, but less than probable cause. Even the higher standard of probable cause requires much less than a certainty, as it is said to exist simply if the circumstances known to the officer would warrant a prudent man in believing a suspect had committed a crime. *Henry v. United States*, 361 U.S. 98 (1958); *Giordenello v. United States*, 357 U.S. 480 (1959). It does not depend on the same type of evidence as would be needed to support a conviction. *Draper v. United States*, 358 U.S. 307 (1959).

Hence, these considerations are relative, and can be compared to a ladder with four rungs: at the highest level is certain knowledge, as in the case of an eyewitness to a crime; next is probable cause, less than a certainty, but enough to satisfy a prudent man; lower yet is a reasonable suspicion; and at the lowest level, a bare or imaginery suspicion, founded on nothing more than a hunch. Applying that standard to this case, we regard the requirements of reasonable suspicion as having been fully satisfied.

To validate this conclusion one need look no farther than the landmark decision of the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968). The circumstances of that case provide a striking analogy to this case. Terry had appealed a conviction for carrying a concealed weapon. He was observed by a detective about 2:30 one afternoon. The officer's interest in Terry and two companions was aroused because they walked back and forth in a particular block peering in a store window and then conferring at the corner. The officer became suspicious and believed the men were "casing" the store for a robbery. He approached the

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[1] Time is not an issue here and presumably the stop had not exceeded 10 to 15 minutes when the suspected burglary was confirmed.

men, identified himself as a police officer, and asked for their names; he was not acquainted with any of the three by name or sight and had received no information concerning them from any source. When the men "mumbled something" in response to his question the officer grabbed Terry, "spun him around" to frisk him and found a pistol in his overcoat pocket. The Supreme Court of the United States, whose sensitivity to Fourth Amendment constraints needs no defense, affirmed a decision of the Supreme Court of Ohio that the revolver was properly admitted in evidence, holding that the officer had reasonable grounds to believe that Terry was armed and dangerous and that his behavior justified an investigative stop. The court noted that the suspects had gone through a series of acts, while innocent in themselves, when taken together warranted further investigation. And while the officer could not rely entirely on his intuition, he could draw on his experience in observing people under a variety of circumstances. The cases are rationally indistinguishable. A similar holding was reached in *Adams v. Williams*, 407 U.S. 143 (1972).

In *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the court dealt with the problem of the United States Border Patrol's authority to stop automobiles near the Mexican border. Referring to *Terry v. Ohio*, the court said:

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response . . . *A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.* (Emphasis supplied.)

In *Reid v. Georgia*, 448 U.S. 438, *Terry v. Ohio* was described as holding that conduct *lawful in itself* can be

such as to arouse a reasonable suspicion when viewed by a trained police officer.

In *United States v. Cortez*, 449 U.S. 411 (1981), the court observed that while trained police officers are able to draw inferences and make deductions that might well elude others, in the final analysis investigatory stops must be justified by some objective manifestation that the person is engaged in criminal activity. Noting that *the whole picture* must be considered the court said:

> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. *Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.* (Emphasis supplied.)

In this case the objective manifestations are found in the fact that the suspects were followed a considerable distance and observed to study residences along the way as if to be "casing" them; coupled to those circumstances are the knowledge and observations of Officer Swint that the area had been frequently burglarized, that the vehicle was unfamiliar to him, the occupants unknown to him and were thought to have just emerged from the Brown driveway 45 minutes to an hour after the informant observed them "casing" the residence. Singly, those circumstances indicate to nothing; collectively, they add up to a reasonable suspicion. The case may be stronger than *Terry v. Ohio*—stores and store windows, unlike private homes, are intended to attract scrutiny. We conclude that the initial stop of the appellants was based on reasonable suspicion and hence not a violation of the Fourth Amemdment.

The second phase of appellants' argument is that the warrantless search of the automobile was a violation of the Fourth Amendment. But we believe the search comes within the "automobile exception" announced in *Carroll v. United States*, 276 U.S. 132 (1925). The State does not contend the search was incidental to a lawful arrest (assuming appellants' detention amounted to an arrest), as such searches are restricted to the passenger compartment of the vehicle. *New York v. Belton*, [2] 101 S.Ct. 2860, 68 L.Ed. 492 (1981). What is claimed, correctly we think, is that when Officer Swint learned the Brown residence had been burglarized, at that point he had probable cause to believe the vehicle contained evidence of the crime and, hence, a search of the vehicle was proper. Rule 14.1 (a), A.R.Crim.P., gives an officer the right to make a warrantless search of a vehicle detained on a public way if he has reasonable cause to believe the vehicle contains evidence subject to seizure, and exigent circumstances require immediate action to prevent removal or destruction of such evidence. Rule 14.1 is consistent with *Carroll v. United States*, in permitting search and seizure whenever "probable cause to believe that the area contains evidence of a crime conjoins with any exigency arising out of the mobility and imminent disappearance of that same constitutionally protected area." [3] See also *Chambers v. Maroney*, 399 U.S. 42 (1970).

Appellants cite *Burkett v. State*, 271 Ark. 150, 607 S.W.2d 399 (1980), and *Scisney v. State*, 270 Ark. 610, 605 S.W.2d 451 (1980), where we held a warrantless search of

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[2] Where it was held that "when a policeman has made a lawful custodial *arrest* of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."

[3] "The Automobile Exception: What It Is and What It Is Not—A Rationale in Search of a Clearer Label" by Judge Charles Moylan 27 Mercer Law Review 987 (1975).

wrapped parcels and suitcases was improper. But the distinguishing aspect is that in those cases the initial arrest was due merely to a faulty tail light and there was a lack of probable cause to believe the vehicles contained marijuana.

Appellants also press the argument that the garment bags were closed and, hence, under the "suitcase doctrine" there was an expectation of privacy in such containers, as recognized in *Arkansas v. Sanders*, 442 U.S. 753 (1979), and *United States v. Chadwick*, 433 U.S. 1 (1977). But that fact issue was disputed and the trial court apparently relied on the office's testimony that one of the garment bags was open and its contents clearly visible to him. Had the garment bags been closed, then the rationale of the suitcase doctrine might arguably apply on the theory that when the suspects and the containers are in custody, exigent circumstances disappear and a warrant can be sought at leisure. But even that is a debatable point, as the language of footnote 13, page 764, *Arkansas v. Sanders, supra*, suggests:

> Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred by their outward appearance.

Appellants argue inferentially that exigent circumstances disappear when the suspects and the vehicle itself are in custody, but that is not the law and, if reason prevails, will not become the law. Containers the size of suitcases can be readily secured in police custody but the impracticality of securing an automobile is self-evident, as the United States Supreme Court noted in *Chambers v. Maroney, supra*, where the court reviewed the automobile exception:

> *Carroll v. U.S.* holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible. (Page 51.)

This is not to deny the existence of that school of cases which has barred a warrantless search of automobiles where both the suspect and the vehicle are in custody. (See *Jenkins v. State*, 253 Ark. 249, 485 S.W.2d 451 (1972), *Steel v. State*, 248 Ark. 159, 450 S.W.2d 545 (1970), *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), *Preston v. United States*, 276 U.S. 364 (1963).) But those decisions distinguish a search at the scene of arrest as opposed to a search remote in *time* and *distance* from the situs of the arrest, under circumstances more conducive to the securing of a search warrant. We think the trial court correctly denied the motion to suppress.

II.

Secondly, appellants ascribe error to the refusal to allow the introduction of statements elicited from them by the police. Although appellants declined to testify, they sought to introduce statements each had given the police after their arrest. The statements claimed they had bought the articles (consisting of a mink coat and an estimated $20,000.00 worth of silver service) for $300.00 from two men they met that morning at a McDonald's restaurant and known to them only as Larry and Mike. The statements were offered as an admission against penal interest, under Rule 804 (b) (3), Uniform Rules of Evidence, Ark. Stat. Ann. §28-1001 (Repl. 1979), on the theory that the statements exposed them to a charge of receiving stolen property. Before statements against penal interest are admissible under Rule 804 the court must be satisfied that the corroborating circumstances clearly indicate the trust-

worthiness of the statement. See *Welch v. State*, 269 Ark. 208, 599 S.W.2d 717, cert. den. 449 U.S. 996 (1980). The circumstances surrounding these statements fail decidedly to meet that test and the trial court was right to exclude them.

III.

Finally, appellants contend that the court erred in allowing the deputy to give an opinion that the Cadillac had backed from the Brown driveway just before he saw it. Rule 701, Uniform Rules of Evidence, allows a lay witness to state an opinion if it is rationally based on his perception and would be helpful to a clear understanding of his testimony or to the determination of a fact issue. Whether the car had backed from the Brown driveway was a relevant issue. But more, its diagonal position in the highway, relative to the driveway, and its movement as he observed it, provided a rational basis for the opinion he gave. The difficulty of verbalizing the movement of objects and physical events often requires some degree of opinion by the observer and the speed and movement of automobiles, as of people, illustrate the reason for the rule. See *Mathis v. State*, 267 Ark. App. 904, 591 S.W.2d 679 (1979). The trial court did not err in allowing the testimony.

The judgments are affirmed.

Hickman, J., concurs.

Holt, Purtle, and Dudley, JJ., dissent.

APPENDIX "C"

SUPREME COURT OF ARKANSAS

No. CR 81-47

Opinion Delivered Mar. 8, 1982

Charles Tillman and
Charles Huggins,
Appellants,
V.
State of Arkansas,
Appellee
and
Leandrew Byrd, Jr.,
Appellant,
V.
State of Arkansas,
Appellee

Concurrence

DARRELL HICKMAN, Associate Justice

I concur because of the views I expressed in my dissenting opinion in *Moore v. State*, 268 Ark. 171, 595 S.W.2d 245 (1980).

APPENDIX "D"

Office of the Clerk
Supreme Court of the State of Arkansas
Arkansas Court of Appeals
Little Rock

April 12, 1982

William C. McArthur
Attorney at Law
P. O. Box 589
Little Rock, AR 72203

Re: CR 81-47. Charles Tillman and Charles Huggins v. State of Arkansas

Dear Mr. McArthur:

The Court made the following order in the above styled case today:

"Petition for Rehearing is denied. Holt, Hickman and Dudley, JJ., would grant."

Sincerely yours,

/s/ Dona L. Williams
Dona L. Williams, Clerk

DLW:rh

cc: Theodore Holder
Garland Bain

Supreme Court, U.S.
FILED
JAN 17 1983
ALEXANDER L. STEVAS
CLERK

No. 82-706

In the

Supreme Court of the United States

October Term, 1982

Charles Tillman ..... *Petitioner*

V.

State of Arkansas ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
IN OPPOSITION TO PETITION

STEVE CLARK
Attorney General

By: THEODORE HOLDER
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

Attorneys for Respondent

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE INITIAL STOP AND DETENTION OF THE PETITIONER VIOLATED HIS RIGHTS UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

II.

WHETHER THE SEARCH OF THE AUTOMOBILE VIOLATED THE PETITIONER'S RIGHTS UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

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No. 82-706

In the

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October Term, 1982

Charles Tillman ..... *Petitioner*

V.

State of Arkansas ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
IN OPPOSITION TO PETITION

OPINION BELOW

The opinion of the Arkansas Supreme Court is found at 275 Ark. 275, 630 S.W.2d 5 (1982), and is reproduced in Appendix B of the petition at pages A-15 through A-23, inclusive, immediately following the reproduction of the dissent in Appendix A.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED
(In addition to those cited by the petitioner)

Rule 2.1, Arkansas Rules of Criminal Procedure, Ark. Stat. Ann., Vol 4A (Repl. 1977), provides:

> For the purposes of this Article, unless the context otherwise plainly requires:

> "Reasonable suspicion" means a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion.

Rule 3.1, Arkansas Rules of Criminal Procedure, Ark. Stat. Ann., Vol. 4A (Repl. 1977), provides:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

STATEMENT OF THE CASE

The respondent is generally satisfied with the petitioner's statement of the case, but supplies the following deficiencies in it.

The unnamed and unknown informant who told Officer Swint about the presence of the petitioner and his cohorts in the area in which they were first seen stated not only that the three looked as if they were reconnoitering residences, but also that they looked as though they were about to burglarize a house Swint knew to be owned by Mr. George Brown. Swint regularly patrolled the area, going there on the average of every other day, and knew most of its residents. The area is sparsely populated, and Swint was aware of a rather high incidence of burglary in the area at that time. He had never seen a car such as that in which the petitioner and his companions were traveling in the area before.

Swint radioed another officer to investigate the Brown residence and then followed the petitioner and his cohorts into Pulaski County, which was very close by.

When he gained the assistance of a Pulaski County sheriff's deputy, Swint stopped the three and handcuffed them and put them in the back seat of his patrol car. He then received word via the radio that the Brown residence had, indeed, been burglarized and that a large number of silver serving pieces had been taken.

Swint then searched the car, including the trunk. In the trunk he found two garment bags, one of which was partially unzipped and clearly packed with articles of a silver service.

At this point the petitioner was arrested for burglary and theft of property.

REASONS FOR DENYING THE WRIT

The argument upon which most emphasis is placed can be stated in a nutshell as follows: because there was neither probable cause for an arrest, nor reasonable suspicion for an investigatory stop to justify Officer Swint's initial stop of the petitioner and his cohorts, the evidence seized as a result of the stop should have been suppressed as the fruit of the poisonous tree in accordance with *Wong Sun v. United States*, 371 U.S. 471 (1963). The decision of the Arkansas Supreme Court holding otherwise is said to be erroneous.

The respondent cannot agree and submits in response that the initial stop was justified as an investigatory stop. After the stop was accomplished and the petitioner and his companions secured, probable cause to search the automobile in which the three had been traveling arose when Swint learned from another officer via radio communication that the Brown residence had in fact been burglarized and silver serving pieces stolen.

Officer Swint's reasonable suspicion or legal cause to make an investigatory stop was based on several facts. First was the tip from the unknown informant that the petitioner and his two companions were apparently reconnoitering residences in an area known to Swint to have been plagued by a recent rash of burglaries. The neighborhood was a sparsely populated rural neighborhood, most of the residents of which were personally known to Swint. The automobile in which the three men were traveling, a brown Cadillac bearing the personalized Arkansas license plate of "FOXY BT", was also known to Swint not to belong in the neighborhood. The informer also stated that the three looked as if they were about to burglarize the house known to Swint as the home of Mr. George Brown.

The respondent notes at this juncture the petitioner's attempt to apply to this tip the two pronged test for

affidavits for search warrants in which hearsay appears announced in *Spinelli v. United States*, 393 U.S. 410 (1969), and *Aguilar v. Texas*, 378 U.S. 108 (1964). The tip in this case is not relied upon for probable cause to search. *Aguilar* and *Spinelli* are, therefore, inapposite. The petitioner has cited no authority holding that law enforcement officers must subject such volunteered information to such rigorous scrutiny in order to use it for purposes of an investigatory stop, and the respondent knows of none. Because the *Aguilar-Spinelli* test is concerned with probable cause to search, a standard higher than that set for the reasonable suspicion of criminal activity needed to make an investigatory stop, the lack of authority applying that test to reasonable suspicion and investigatory stops is not surprising.

In any event, the tip proved to be reliable, for when Swint arrived in the neighborhood, the petitioner's automobile was observed in a position consistent with just having backed out of the Brown residence. Rather than allow the automobile to leave the area entirely and become unavailable while investigating the Brown residence for evidence of illegal entry, Swint followed the automobile at a discreet distance while radioing police headquarters to have another officer make sure of that of which Swint was virtually certain—the burglary of the Brown residence and the theft of property therein.

Swint followed the automobile into the next county, which was very close, and stopped the petitioner and his cohorts after gaining the assistance of a sheriff's deputy from that county.

This stop was justified as an investigatory stop; that is, Swint had a reasonable suspicion at this point of criminal activity, i.e., burglary and theft. As stated by this Court in *United States v. Brignoni-Ponce*, 442 U.S. 873 (1975), citing *Adams v. Williams*, 407 U.S. 143 (1972) at 145, 146 and quoted by the Arkansas Supreme Court:

> *A brief stop* of a suspicious individual, *in order* to determine his identity or *to maintain the status quo momentarily while obtaining more information*, may be most reasonable in light of the facts known to the officer at the time. (Emphasis supplied.) 422 U.S. 881.

The stop now in question is nothing more. Based on the facts set out above and the knowledge Swint had of the area without further investigation, Swint had much more than a hunch of criminal activity.

He had a rather strong suspicion of burglary and theft based on objective manifestations of such set out above, as required by *United States v. Cortez*, 449 U.S. 411 (1981), also cited and quoted by the Arkansas Supreme Court, and not based only on that subjective, visceral feeling known in the vernacular as a hunch.

Contrary to the petitioner's assertion, the petitioner was not arrested at this point. It might well be that Swint used the word, arrest, in his testimony in describing what he did at this point, but Swint is hardly authority enough to label this detention an arrest as a matter of law. Two state courts have found otherwise and there appear no exceptional circumstances here present to warrant this Court's non-acceptance of those factual findings. In this regard see *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

Probable cause to search the automobile in accordance with *Carroll v. United States*, 267 U.S. 132 (1925), arose when Swint received word confirming his suspicion that the Brown residence had been burglarized and silver serving pieces stolen from within. As stated by the Arkansas Supreme Court, probable cause to search an automobile pursuant to *Carroll, supra*, does not evaporate simply because the automobile is stopped and its occupants under control for the time being. In this regard see *Chambers v. Maroney*, 399 U.S. 42 (1970).

The petitioner also contends, assuming as fact that the garment bags in which the silver was packed were all zipped closed when Swint looked into the trunk of the automobile, that the search of the garment bags was in contravention of the Fourth Amendment as construed in the recent case of *Robbins v. California*, 453 U.S. 420 (1981).

Robbins applies to the case at hand if, and only if, it is taken as fact that the garment bags were totally closed at the time Swint viewed them, but this cannot be assumed. Because both the state trial court and the Arkansas Supreme Court found as a fact that one of the bags was partially unzipped, it cannot be said that the bags were searched or that *Robbins* applies.

As stated in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., supra*, at 445 U.S. 111-112:

> . . . we customarily accept the factual findings of state courts in the absence of "exceptional circumstances." *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157, 160, 97 L.Ed. 168, 73 S.Ct. 204 (1952).

The two major exceptions to this rule were aptly stated as follows in *Fiske v. Kansas*, 274 U.S. 380, 385 (1927):

> . . . where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts."

See, also, generally, *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Whitus v. Georgia*, 385 U.S. 545 (1967).

Because neither exception is applicable here, the fact is that one of the bags was partially unzipped and the silver in plain view. Thus, *Robbins* is inapposite.

The respondent notes in closing that, inasmuch as this Court is not the proper forum for the advancement of Arkansas law, the argument concerning the same is misplaced in this petition.

The respondent submits without further ado that the petition filed herein does not warrant the issuance of a writ of certiorari.

CONCLUSION

Rule 17, Rules of the Supreme Court of the United States, sets out several considerations that go into the decision as to whether to issue a writ of certiorari to a state's court of last resort. The petitioner claims none of these grounds as his own and the reason why is that none of them apply. The petitioner seeks certiorari not for these reasons, but only because the outcome in the state court was not to his liking. As a result the petition should be denied.

Respectfully submitted,

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